412 644-5754

Date: April 22, 1996

Case No.: 95-STA-12

In the Matter of

RICHRAD F. CACH,
Complainant

v.

DISTRIBUTION TRUCKING COMPANY,
Respondent

Appearances:

David Hollander, Esq.
For the Complainant

David H. Wilson, Esq.
For the Respondent

Before: THOMAS M. BURKE
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Richard Cach ("complainant") filed complaints with the Department of Labor dated July 16, 1994 and August 4, 1994 alleging that Distribution Trucking Company ("respondent") took disciplinary action against him in violation of section 405 of the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 2305 ("STAA"). The Regional Administrator of the Occupational Safety and Health Administration in Seattle, Washington, issued his determination on November 18, 1994 for the Secretary of Labor, that complainant's complaints lacked sufficient evidence to support a finding that discriminatory action occurred.

Complainant filed a written objection to the Acting Regional Administrator's determination on December 12, 1994 and requested a hearing before the Office of Administrative Law Judges.

A hearing was set for February 28, 1995 in Portland, Oregon. Respondent moved to postpone the hearing pending the outcome of a collective bargaining arbitration proceeding. Respondent argued that the outcome of the arbitration proceeding could impact the resolution of the STAA complaint because the subject of the arbitration proceeding, suspension and discharge of the complainant, was also the subject of this STAA complaint.

Respondent grounded its motion on 29 C.F.R. § 1978.112(b) which provides that due deference should be paid to the jurisdiction of other forums established to resolve disputes which may also be related to STAA complaints.

Complainant answered that he had no objection to the postponement so long as the hearing would be rescheduled no earlier than forty-five days from the date of the Arbitrator's award. Accordingly, the hearing on the STAA claim was continued pending a decision in the arbitration proceedings.

The Arbitrator issued his award on March 22, 1995. He found in favor of the respondent. He determined that the suspension and discharge of the complainant was for just cause. Respondent moved that the Administrative Law Judge defer to the outcome of the arbitration proceeding, and on the basis of the Arbitrator's decision, dismiss the complaint. Complainant opposed the motion. The parties submitted memoranda of law in support of their positions. On June 2, 1995 a Decision and Order Denying Motion To Defer To Arbitrator's Decision was issued by the undersigned Administrative Law Judge.

The hearing on the merits of the complainant's STAA complaints was held on September 19 and 20, 1995 in Portland, Oregon. Complainant and respondent filed post-hearing briefs on January 16, 1996 and replies to opposing party's brief on February 2, 1996.

FINDINGS OF FACT

Complainant, Richard Cach, has worked as a tractor trailer driver for about 15 years. (Tr. 34) He was employed by respondent, Distribution Trucking Company, from November, 1986 until July, 1994. (Tr. 31) He worked out of the respondent's Clackawmas Distribution Center in Portland, Oregon.

Respondent is Distribution Trucking Company, a business entity engaged in interstate trucking operations and maintaining a place of business in Portland, Oregon. In the regular course of business, respondent operates commercial motor vehicles with a gross vehicle weight rating in excess of 10,000 pounds princibly to transport cargo. (Tr. 253) Respondent is a wholly-owned subsidiary of Fred Meyer. Its function is to distribute retail merchandise to Fred Meyer retail department stores in seven western states. In mid 1994, respondent employed about 200 drivers, and operated about 165 tractors and between 700 and 750 trailers. Respondent operates year around, every day of the year but Christmas, seven days a week, twenty-four hours a day. (Tr. 213, 214)

In April of 1993, respondent adopted a policy governing lunch breaks and rest breaks for its hourly drivers. The policy

provides that the rest breaks must be taken at approximately the middle of each one-half shift, that neither lunch nor rest breaks should be taken on overtime, and that the drivers are not to go off route for their breaks and/or lunches. Also, the drivers must list the specific location of their breaks and lunch on their trip sheets.[1] (Tr. 215; Respondent's Exhibit No. 1, p. 18; Respondent's Exhibit No. 2) The policy was announced in an April 8, 1993 memorandum from Mike Bletko. The memorandum stated that a purpose of the policy was to have well rested alert drivers on duty. (Respondent's Exhibit No. 2) Article XXV of the collective bargaining agreement provides that any employee abusing any provision of the Article providing for lunch and rest breaks shall be subject to discharge or suspension. (Respondent's Exhibit No. 1, p. 18)

Michael Bletko is the general manager of respondent and vice-president of Fred Meyer. During mid-1994 Bletko had approximately 200 employees under his supervision. (Tr. 213) He testified that the purpose of the policy is to improve the economy and efficiency of respondent's trucking operations. (Tr. 215, 216) Before the policy it was common for drivers to take no breaks during their shift, instead taking all their breaks together after completing their shift, thereby requiring the payment of overtime rate for the final hour. (Tr. 215) It was hoped that the drivers would take their breaks timely and during periods when events were keeping them from driving. (Tr. 216, 217) Also, drivers were driving significant distances off route with their tractor trailers, some going home. Deviations from and return to the driver's assigned route added time to a trip, resulting in an unnecessary cost. (Tr. 215)

Twelve days after the issuance of the April 8, 1993 memorandum, on April 21, 1993, complainant was given a written warning and suspension based in part on his failure to comply with the lunch and break policy. Specifically, complainant failed to indicate the location of his breaks and lunch on his trip sheet. Complainant was given a two day suspension that was later reduced to one day. Complainant requested from Bletko a copy of the breaks and lunch policy about this time. (Tr. 227) Complainant understood what the policy required and that it would be enforced. (Tr. 170)

Warning Letter

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[1] Each driver receives a trip sheet at the start of each shift. The trip sheet shows his delivery schedule for the day. During the day the driver records his actual arrival and departure times at each destination. Under the breaks and lunch policy, the driver is also required to record the times and location of each of his breaks. (Tr. 221-223)

Bletko testified that he came across complainant's trip sheet for February 11, 1994 when looking for unrelated information on the trip's delivery. (Tr. 228) The trip sheet showed that complainant had combined his break and lunch, took his combined break and lunch on overtime, and drove off route to the restaurant of his choice for his combined lunch and break. (Respondent's Exhibit No. 8; Tr. 228) Bletko met with complainant to request an explanation for the violations. Bletko testified that complainant did not dispute that the events occurred but rather questioned the legitimate enforceability of the policy.

Complainant testified that his break and lunch schedule on February 11, 1994 was no different than the schedule he had been following since the prior May. He couldn't remember "hardly any day" between May and January when he didn't combine his lunch or break "or something of that nature," and he knew other drivers who were ignoring the policy. (Tr. 42)

Bletko responded by issuing a warning letter on February 28, 1994 which emphasized to complainant that he could face suspension or discharge if he again violated the policy. (Respondent's Exhibit No. 8) Complainant filed a grievance over the February 28, 1994 warning letter, arguing that it was not timely issued. He did not dispute the accuracy of the facts set forth in the warning letter. (Respondent's Exhibit No. 10, pp. 173, 174)

Suspension

Bletko periodically checked complainant's trip sheets after the February 28, 1994 warning letter. Bletko testified that he does not check a driver's trip sheets in the normal course of business. He reviews about six a week over such concerns as time of delivery, identification of product delivered, or amount of product delivered. (Tr. 225) He will also spot check the trip sheets of a driver who has had disciplinary problems to see if the problems have continued. (Tr. 226) Bletko discovered violations by complainant of the lunch and break policy on May 19 and 20, 1994. On May 19, complainant took his break on overtime and drove twelve minutes off route to reach the break point of his choice. On May 20, complainant combined his break and lunch and drove 20 minutes off route to reach the break point of his choice. (Respondent's Exhibit No. 12; Tr. 233-236) Bletko met with complainant to discuss the violations. His intent in meeting with complainant was to attempt to bring complainant's conduct into compliance. Bletko testified that the complainant did not deny any of the violations but rather expressed ridicule that Bletko thought any driver was going to abide by that policy. (Tr. 238)

In a May 25, 1994 letter Bletko suspended complainant for

two days because complainant "blatantly disregarded company policy" by the May 19 and 20 violations. (Respondent's Exhibit No. 12) Complainant filed a grievance over the suspension. He did not dispute that the violation occurred. He argued that the contract prohibited the issuance of the suspension because the February 28 warning letter was untimely. (Respondent's Exhibit No. 14) The arbitrator rejected the grievance. (Respondent's Exhibit No. 27, p. 26)

Complainant does not deny ignoring the lunch and break policy even after receiving the February 28 warning letter. He readily admits that he continued to deliberately violate the rule because he was under the mistaken impression that the violations would subject him to no more severe discipline than a warning letter. He was assured by the union business agent that the February 28, 1994 warning letter was null and void because it was untimely issued, and therefore a subsequent warning letter was required before more progressive discipline could be taken. "...I realized that the worst case scenario would be that I would get another warning letter..." (Tr. 176) Complainant testified: "it was not a surprise to me that I got written up for what I was written up for, knowing that I was doing these things. The real surprise was that instead of a warning letter, it was a suspension letter." (Tr. 68)

Termination

On the day that complainant received his two day suspension, May 25, 1994, complainant wrote on his trip sheet: "Two-day suspension for bad behavior." (Respondent's Exhibit No. 13, p. 62) Likewise, on his June 17, 1994 trip sheet complainant caustically remarked:

> I would have preferred to take this break after delivering WAR, but service to the stores has taken a secondary role to adhering to senseless memos and bottom-line mentality. (Not that this has made any difference in the cost of my services for the day).

(Respondent's Exhibit No. 16; Tr. 70)

Bletko checked complainant's trip sheet for July 25, 1994 and again found that the complainant had violated the breaks and lunch policy by taking his break on overtime. (Tr. 244, 245) Bletko's recollection is that the July 25 trip sheet was the first one of complainant's that he checked after the May 25 suspension. He had actually intended to look at complainant's trip sheets earlier but his attention was diverted by an impending labor strike. (Tr. 286)

Bletko had two meetings with the complainant regarding the

July 25 violation. He met with complainant on July 27 to show him the trip sheet and get an explanation. Bletko testified that complainant offered the explanation that he had no other opportunity to take his break, but that he, Bletko, pointed out opportunities for a break during the regular hours. (Tr. 246) Bletko made no decision on discipline at that meeting. Bletko met with complainant the next day. He was considering either suspension or discharge. Bletko testified that he would have issued complainant a suspension if complainant would have recognized respondent's authority to establish the break and lunch policy and his own failure to abide by the rules. Bletko told complainant they had a fundamental problem, larger than complainant taking his last break on overtime.

> It was larger than him taking his last 15-minute break on overtime. It was his refusal to recognize the company's right, legitimate authority to require him to take his breaks and lunch on time, to document the breaks and lunches, to follow the rules that were set down, and as long as he refused to recognize the company's authority in those areas, we were going to have problems. And it was suggested in the meeting that he could resolve the -- this issue with a suspension, if he recognized those things... (Tr. 247)

Bletko decided to discharge complainant. Bletko testified that complainant's statements to him at the second meeting convinced him that the complainant still did not recognize the respondent's authority to implement the policy and that a suspension was not going to do any good, the complainant would be soon back in his office to discuss a violation of a company rule complainant didn't agree with. Specifically, Bletko expressed exasperation that complainant's response to the violations centered around the validity of the warning letter, not future compliance with the policy. (Tr. 247, 248)

Complainant's recollection of the discussion during the meeting is similar; it differs on the message he intended to convey to Bletko with his statements. Complainant agrees that the meeting would have ended with a suspension if he would have accepted it and not voiced an intent to file a grievance. He mentioned filing a grievance because he thought his case could be argued on its merits. (Tr. 77, 78, 196)

Complainant's employment with respondent was terminated by letter dated July 29, 1994. The letter stated that complainant was discharged for violation of company policy regarding breaks and lunch, and that it constituted the final step in discipline progression after a written warning and a two day suspension. (Complainant's Exhibit No. 7)

Complaints To DOL

Complainant was one of five employees of respondent who filed a complaint with the Department of Labor ("DOL") on January 12, 1994 alleging that discipline imposed upon him for his failure to operate a commercial vehicle on assigned days between Christmas, 1993 and New Years Day, 1994 violated § 405 of the STAA. The Department of Labor determined that the complainant's complaint had merit and they ordered respondent to compensate complainant with back pay and expunge from personnel records any adverse reference to his absence from work during the period December 26, 1993 through January 2, 1994. Respondent was notified of the filing of the complaint by letter from DOL dated January 19, 1994 and received by respondent on January 26, 1994. Respondent was notified of the DOL's determination that complainant's complaint had merit by letter from DOL dated March 22, 1994 and received by respondent on April 1, 1994. (Complainant's Exhibit No. 9; Tr. 44-52) Respondent did not request a hearing on the Department of Labor's determination but rather agreed to compensate the complainant for the wages he missed as a result of a one day suspension imposed by respondent. (Tr. 52)

Complainant filed a second complaint with the DOL on May 31, 1994 wherein complainant requested wages for Christmas Day 1993 and New Years Day 1994. He alleged discrimination because drivers do not have the option of reporting to work ill and getting paid. Complainant argued that the federal safety regulation prohibiting drivers from operating a truck while too sick to drive results in a loss of wages, unique to the occupation of truck drivers. (Complainant's Exhibit No. 5) DOL rejected complainant's second complaint. (Complainant's Exhibit No. 9, p. 4)

Complainant filed a third complaint with the DOL on July 16, 1994. He complained that shortly after filing a complaint with the DOL, he received first a warning letter and subsequently a two day suspension for very minor infractions of company policy, and that the discipline was arbitrary and selective as virtually every other driver was committing the same minor infractions. (Complainant's Exhibit No. 6)

Complainant filed a fourth complaint with the DOL on August 4, 1994, alleging that his termination on July 29, 1994 was in direct retaliation for filing the July 16, 1994 complaint. Complainant's third and fourth complaints with the DOL constitute the subject of this case.

DEFERENCE TO ARBITRATOR

Respondent moved before the hearing to defer resolution of this complaint to the outcome of a collective bargaining arbitration proceeding pursuant to 29 C.F.R. § 1978.112(b). The motion was denied because the collective bargaining arbitration case was found to be significantly different than an adjudication under the STAA, and, therefore, the arbitration proceedings did not adequately consider and protect the complainant's rights under the STAA. See Decision and Order Denying Motion To Defer To Arbitrator's Decision issued June 2, 1995.

PRIMA FACIE CASE

Section 405 of the STAA was enacted in 1983. This legislation is intended to promote safety of the highways by protecting employees from disciplinary action because of an employee's engagement in protected activity. Section 405(a) provides as follows:

> No person shall discharge, or in any manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because such employee (or any person acting pursuant to a request of the employee) has filed any complaint or instituted or caused to be instituted any proceeding relating to a violation of a commercial motor vehicle safety rule, regulation, standard, or order, or has testified or is about to testify in any such proceeding.

49 U.S.C. § 2305(a)(1983).

In a case brought under section 405, the initial burden is on the complainant to establish a prima facie case of retaliatory discharge. To do so, complainant must establish: (1) that he was engaged in protected activity under the STAA; (2) he was the subject of adverse employment action and the employer was aware of the protected conduct when it took the adverse action; and (3) there was a casual link between his protected activity and the adverse action of his employer. Once complainant establishes a prima facie case, raising the inference that the protected activity was the likely reason for the adverse action, the burden shifts to respondent to demonstrate a legitimate non-discriminatory reason for its action. Even if respondent demonstrates such a reason, complainant may prevail by showing that the stated reason was pretextural. Moon v. Transport Drivers, Inc., 836 F.2d 226, 229 (6th Cir. 1987). If, however, the trier-of-fact decides that there were "dual motives" for the adverse action, that is, that the respondent's action was motivated by both an illegal motive and a legitimate management

reason, the respondent may prevail only by showing by a preponderance of the evidence that it would have taken the same action even if the complainant had not engaged in the protected activity. Palmer v. Western Truck Manpower, Case No. 85-STA-6, Secretary of Labor, January 11, 1987.

Protected Activity

Complainant engaged in protected activity on each instance that he filed a complaint with the DOL under the STAA alleging discriminatory treatment by his employer.

Adverse Action

Complainant suffered adverse actions by respondent when he was given the written warning on February 28, 1994, the two day suspension on May 25, 1994, and the termination of his employment on July 29, 1994.

Knowledge of Protected Activity

Complainant must show that the respondent had knowledge of his complaints with DOL at the time of the adverse employment actions. Complainant's first complaint with DOL was filed by telephone on January 12, 1994. Respondent was notified of the complaint by certified mail return receipt requested dated January 19, 1994 and received by respondent on January 26, 1994. (Complainant's Exhibit No. 9, p. 8) Thus, complainant has shown that respondent was aware of his complaints to the DOL when the adverse actions were taken.

Inference of Causation

Complainant has shown that he engaged in protected activity, and that he suffered an adverse action when he was subsequently fired. Complainant must, to establish a prima facie case, present evidence to raise the inference that the protected activity was the likely reason for the adverse action. Dean Dartey v. Zach Company of Chicago, Case No. 82-ERA-2, slip op., Secretary of Labor, (April 25, 1983). Stack v. Preston Trucking Co., Case No. 86-STA-22, slip op., Secretary of Labor, February 26, 1987, and Haubold v. Grand Island Express Inc., Case No. 90-STA-10, slip op., Secretary of Labor, April 27, 1990.

Complainant received the February 28, 1994 warning letter about 33 days after respondent was notified on January 26 by the DOL of complainant's initial complaint with the DOL. The letter announcing complainant's two day suspension was dated May 25, 1994, less than a month after complainant filed his second complaint with the DOL and less than two weeks after complainant inquired from Bletko information about respondent's compliance with the DOL order resulting from the January 12 complaint.

Complainant's third complaint with the DOL was received by respondent on July 23, about six days prior to respondent's discharge of the complainant.

This temporal proximity of the disciplining of complainant to the protected activity is sufficient in itself to raise the inference that the protected activity was the reason for the adverse action. The Court of Appeals in Couty v. Dole, 886 F.2d 147 (8th Cir. 1989) held that the temporal proximity of "roughly thirty days" is sufficient as a matter of law to establish an inference of retaliatory motivation. See also the Secretary's decision in Goldstein v. Ebasco Contractors Inc., Case No. 86-ERA-36, Secretary of Labor, April 7, 1992.

RESPONDENT'S REASON FOR TERMINATION

As the complainant has established a prima facie case, respondent has the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate, nondiscriminatory reasons. Significantly, the employer bears only a burden of producing evidence at this point; the ultimate burden of persuasion of the existence of intentional discrimination rests with the employee. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254-255 (1981). Dartey v. Zack Company of Chicago, Case No. 82-ERA-2, Secretary of Labor, April 25 1983. Once a respondent satisfies its burden of production, the complainant then may establish that respondent's proffered reason is not the true reason, either by showing that it is not worthy of belief or by showing that a discriminatory reason more likely motivated respondent. Shusterman v. EBASCO Services, Inc., Case No. 87-ERA-27, Secretary of Labor, January 6, 1992.

Respondent proffers that its disciplinary action toward complainant had nothing to do with complainant's complaints to the DOL. Rather, complainant was given the warning letter, suspended for two days, and ultimately discharged because complainant would not comply with the respondent's policy on scheduling of breaks and lunch.

Respondent offered the testimony of Bletko to explain the break and lunch policy and the reasons why it was issued on April 8, 1993. The policy requires that the hourly drivers must take their breaks at approximately the middle of each one-half shift, that they cannot combine their lunch and a break, they can not take either lunch or breaks on overtime, and they cannot go off route for their breaks and/or lunches. Also, the drivers must list the specific location of their breaks and lunch on their trip sheets. The purpose of the policy, according to the issuing memorandum, is to have well rested alert drivers on duty. The policy also has economic and efficiency consequences to respondent. It lessens the amount of overtime that respondent

must pay to its drivers by assuring the breaks are taken during the normal shift. It hopefully encourages drivers to take their breaks during non-driving periods and it reduces the off route travel and therefore the time a driver takes for each trip.

Bletko testified to the problems respondent faced prodding the complainant to accept the lunch and break policy and comply with it. Those problems surfaced from the beginning. On April 19, 1993, eleven days after the policy was launched, complainant's trip sheet showed that he was not disclosing the locations of his breaks and lunch. This violation constituted part of the basis for a one day suspension. This suspension could not have been a consequence of the complainant's complaint with the DOL as it preceded the filing of any complaint.

On April 21, 1993, the day that complainant received written notice of the suspension, complainant recorded his lunch break as follows: "5:25 pm - 5:55 pm J-Bob's Burgers, Chehalis, Washington, overcast with light rain, ordered garden burger and coffee, used restroom once, waited on by Cindy." (Respondent's Ex. No. 4; Tr. 40) Bletko considered this as complainant's sarcastic way of expressing his disagreement with and contempt for the lunch and break policy. (Tr. 227) Complainant admitted the sarcasm. His intent was to poke fun at the breaks and lunch policy. (Tr. 171)

The February 28, 1994 warning letter was issued after Bletko noticed that complainant's February 11 trip sheet showed that complainant had combined his break and lunch, took the combined break and lunch on overtime and drove off route to a restaurant for his combined lunch and break. When Bletko met with complainant for an explanation, complainant expressed no regret but rather questioned the enforceability and legitimacy of the policy. Complainant readily admits that he had been ignoring the policy. He couldn't remember "hardly any day" between May and January when he didn't combine his lunch or break "or something of that nature," and he knew other drivers who were ignoring the policy. (Tr. 42)

Bletko suspended complainant on May 25, 1994 after determining that complainant was blatantly disregarding company policy by breaches of the lunch and break policy on May 19 and 20. Bletko again met with the complainant to attempt to effect complainant's conduct. However, complainant did not deny the violations, or express regret, but rather ridiculed Bletko's belief that the drivers were going to abide by the lunch and break policy. Complainant admitted that he intended to ignore the policy so long as he thought he could withstand the consequences. The May 25 suspension caught him by surprise as he was under the mistaken impression that the February 28 warning letter, a necessary precursor to a suspension, was invalid.

Bletko's recollection is that the July 25 trip sheet was the first one of complainant's that he checked after complainant's suspension. Again the trip sheet disclosed a violation. Although this violation resulted in complainant's discharge, it was not the act of taking a break on overtime, itself, that finally provoked complainant's discharge. It was complainant's attitude, or at least Bletko's perception of complainant's attitude, toward a policy that complainant didn't agree with. The discharge letter described complainant's attitude when he was made aware of the violations on the trip sheets by stating that complainant did not feel he had done anything wrong, refused to take responsibility for his actions, and he refused to recognize company policy. (Respondent's Exhibit No. 20)

Gerald Mane is employed as a truck driver for respondent and, because of his duties as a union shop stewart, was present at meetings between Bletko and complainant surrounding violations of the lunch and break policy. Mane testified that he does not remember complainant telling Bletko that the lunch and break policy was unenforceable or laughing at Bletko. (Tr. 342, 343) Complainant also testified that he never laughed at Bletko or told him that the lunch and break policy is unenforceable; that he only expressed concern that the policy was being applied unevenly. Notwithstanding Mane's memory of the meetings or complainant's testimony of his demeanor during them, the record as a whole corroborates Bletko's impression that complainant had continually shown contempt for the policy.

Respondent has shown convincingly that the progressive discipline imposed upon complainant which resulted in his discharge was a consequence of complainant's blatant and reckless disregard of a lunch and break policy that respondent was determined to see implemented, and a consequence of Bletko's perception that complainant would continue to disregard the policy in the future. Complainant admits that he would still have his job if he had accepted the five day suspension during the July 28 meeting.

Discriminatory Reasons For Termination

Once a respondent satisfies its burden of showing that the adverse action was motivated by legitimate, nondiscriminatory reasons, the complainant may establish that the respondent's proffered reason was not the true reason by showing that a discriminatory reason more likely motivated respondent. Shusterman v. EBASCO Services Inc., supra.

Complainant argues that during the period of time that he was subjected to progressive discipline for ignoring the lunch and break policy, most, if not all hourly drivers were routinely violating the same policy and were not being disciplined. In support of his argument complainant offers his own testimony, the

testimony of three drivers previously employed by respondent and a sampling of eighteen trip sheets showing 50% compliance with the lunch and break policy.

Complainant testified that he and other drivers continually violated the lunch and break policy prior to February 11, 1994 but that no disciplinary action was taken until after he filed the January 4, 1995 complaint with DOL. (Tr. 41)

Len Farey was employed by respondent from 1980 through 1994. He worked as a driver until January, 1991 when he became a local dispatcher. He testified that it was a common practice for the drivers to combine their rest break and lunch break. (Tr. 102) Forest Shuler worked for respondent from November 11, 1984 until January 5, 1995 as a driver. He testified that at times he combined his rest and lunch breaks and that others did it if their schedule permitted it, and that he was never disciplined because of it. (Tr. 116, 117) Michael Cunningham worked as a local truck driver for respondent off and on for 23 years. He was fired from employment with respondent on August 18, 1994 because of a physical assault during strike activity. (Tr. 138, 139) Cunningham testified that he at times violated the policy of combining lunch breaks and rest breaks but was never disciplined. (Tr. 136)

Bletko doesn't disagree that other drivers have violated the policy. He does, however, contend that when he learned of violations of the lunch and break policy, he took some action, at least an oral admonition, in some cases a written warning, and in other instances imposed more serious discipline. (Tr. 251, 252)

The record does not support complainant's argument that he was the subject of discriminatory enforcement. Complainant himself received a two day suspension for violating the lunch and break policy in April, 1993, months before he filed the DOL complaint. Schuler, on cross examination, recalled receiving warning letters on June 8, 1994 and November 23, 1994 for failing to properly document rest and lunch breaks, and that on May 5, 1993 he was spoken to by Bletko regarding properly completing his trip sheet. Bletko's memorandum of his direction to Schuler states: "I showed him his trip sheet from 5/10/93. I explained delays were not properly handled and how to handle them. I also covered breaks and lunch and the proper documentation for them and the time they must be taken." (Respondent's Exhibit No. 25, p. 101) Schuler was discharged on January 5, 1995 by respondent for falsifying information on trip sheets by showing breaks that he did not take. (Tr. 120) Cunningham was shown on cross examination a memorandum of an oral admonition to him by Bletko regarding the lunch and break policy. The memo authored by Bletko states that Cunningham was informed that his action regarding the lunch and break policy was unacceptable. The specific violations discussed included: failure to log location

of breaks and lunch; took breaks together; and took breaks and lunch untimely.

Respondent also produced letters or memos documenting oral and written warnings regarding violations of the lunch and break policy to other employees including Mike Garcia, Gerry Main, Van Gibson, Timothy Tubbs, Tony Spanu, Joe Remington, Jack McAllister, and LeRoy Helyer. (Respondent's Exhibit No. 25, pp. 104-113; Tr. 252-257)

Nor does the testimony of Farey support complainant's argument. Farey testified that drivers asked him for permission to combine breaks with lunch "all the time" because of the requirements of the April 8, 1993 memo on lunch and break policy, and that drivers were disciplined for driving off route for lunch. Also, as respondent points out in its brief, Farey's testimony that it was common for driver's to combine lunches with breaks does not distinguish between hourly drivers, who were the subject of the lunch and break policy, and the mileage drivers who were permitted to combine lunch and breaks.

The set of 18 trip sheets at Complainant's Exhibit No. 11 showing about 50% compliance with the lunch and break policy supports complainant's statement that other drivers "were getting away with it" (Tr. 193), but they do not bolster complainant's argument that respondent did not enforce the policy even handedly. They do not contradict Bletko's testimony that respondent consistently acted when it found a violation.

Respondent also supports its position that it took no disparate treatment toward complainant by showing no pattern of retaliation against drivers similarly situated. Bletko identified six drivers who also filed STAA complaints with the DOL, Jack Diaz, Leroy Helyer, Paul Bonaduce, Hal Johnson, Gary Eberly and Jeff Longacre. Some of the complaints raised essentially the same allegations as made by complainant in his complaint. Bletko reviewed the work history of each employee to show that no discipline was taken against any of them because of their complaints to DOL.

Bonaduce testified that he filed a complaint with DOL at about the same time and for essentially the same reason as complainant. Similar to complainant, the DOL sustained Bonaduce's complaint and he was awarded back pay and the record of his discipline was expunged. Bonaduce testified that there was no discriminatory action taken against him and that he left respondent's employ on his own volition. (Tr. 156, 158) Bonaduce recalled being told by Bletko that Bletko did not want him to leave because he was a good employee. (Tr. 156)

Diaz filed a complaint with the DOL. He was later suspended for an accident wherein he drove into a bridge while seventy

miles off route. Bletko testified that he did not discharge Diaz for the accident off route because Diaz recognized that he was wrong, and the accident should not have happened. If respondent wanted to retaliate against a driver who complained to DOL, and cover the retaliation with a pretextural reason, Diaz would have been the best case because of the severity of his violation. That respondent did not retaliate against Diaz, or any of the others who filed complaints, raises legitimate doubts that respondent had retaliated against complainant for the same action.

CONCLUSION

Complainant has not shown that respondent's termination of his employment for failure to abide by the lunch and break policy was a pretext for discrimination. Bletko tried but failed to get complainant to take its lunch and break policy serious and to comply with it. Other drivers have in the past and may continue to violate the policy. However, those drivers who came to the attention of respondent were admonished and they subsequently conformed their behavior. (Tr. 257, 258)

The Arbitrator who heard complainant's grievances over his warning, suspension and discharge, after review of his record, came to the same conclusion as that reached here. The reason complainant lost his employment with respondent was not discrimination by respondent but complainant's attitude. His finding bears repeating:

> [Complainant] had the ability to save his job but chose to continue his attitude that the rules were not reasonable, others were not obeying them and he was not going to do so either.

(Respondent's Exhibit No. 27, p. 30)

CONCLUSIONS OF LAW

1. The Surface Transportation Assistance Act governs the parties and the subject matter.

2. Complainant demonstrated that he was engaged in protected activity when he filed complaints with the Department of Labor under the STAA.

3. Complainant demonstrated that he suffered adverse employment actions when he received the warning letter, was suspended and when he was dismissed.

4. Complainant demonstrated that the respondent had knowledge of his complaints with DOL at the time of the adverse employment actions.

5. Complainant presented sufficient evidence to raise the inference that the protected activity was the likely reason for the adverse action.

6. Respondent demonstrated a legitimate non-discriminatory reason for its termination of Complainant.

7. Complainant did not demonstrate that the respondent's proffered reason for complainant's termination was not the true reason through a showing that the termination was more likely motivated by a discriminatory reason.

8. Deference cannot be given to the decision of the grievance proceeding for reason that the proceeding was significantly different than an adjudication under the STAA, and, therefore, the proceedings did not adequately consider and protect the complainant's rights under the STAA.

RECOMMENDED ORDER

Based on the foregoing, IT IS HEREBY RECOMMENDED that the complaint of Richard Cach be dismissed.

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THOMAS M. BURKE
Administrative Law Judge

TMB:mr

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Office of Administrative Appeals, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. The Office of Administrative Appeals has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. See 55 Fed. Reg. 13250 (1990).